525) and in a foot-note to page 625 says must be regarded as overruled. There the testator cut off his widow from any part of his property and directed that she should not receive any benefit therefrom. But he made no disposition of his property. The case was unreported. But the decision, which is stated to have been inserted in the Reports "on account of its peculiarity", was that the widow was entitled to her share in the residue under the Statutes of Distribution. There are two distinctions between that case and the present case. In the present case the widow was given $25; and in the present case other dispositions of the property were made, and it was that part of the estate which remained after the dispositions (including the widow's $25) in respect of which there was an intestacy.

In *Re Holmes*[4] there was, as in the present case, a partial intestacy upon the face of the will. The testator excluded all his relatives, except two nieces, "from any and all advantages or benefit in this my last will and testament." Nevertheless it was held that his statutory next of skin were entitled to their shares upon the intestacy. The reason for this was that they were not claiming any benefit under his *will*. They were claiming a right which the law gave them under the Statute of Distribution, whereby they were entitled to their shares in the residuary estate in respect of which the testator had died intestate. It would have been different if the testator had excluded them "from any and all advantages or benefit from my *estate*."

A converse case was *Bund v. Green*[5]. There the testator excluded five of his next of kin from taking any share in his personal estate of which he might happen to die intestate. It is difficult to imagine a more clear direction that these five persons were to be excluded from the shares which the law would otherwise have given them in the residue of the estate, as to which there was an intestacy.

And this, I think, brings me to the real question which I have to decide. Upon the true construction of clause 3 is the testator merely cutting his widow off from any further benefit under his will (as in *Re Holmes*), or is he depriving her also of the share in his residuary estate which would otherwise have been hers upon the intestacy? After the payment of $25 all connection with her is to be severed. This seems to me far more comprehensive than a direction that she is to have no further benefit under the will. It is a direction to his executors that the final act of association with her is to be the payment of $25, and that thereafter she is to have no further 'connection' with his estate or anything else which pertains to him. I have considered the effect of the subsequent words, which exclude her from the house-properties. It has been stated from the Bar that the testator had no house-properties. This strengthens me in my view that his intention was to deprive the widow of any possible claim to which an unexpected change of circumstances might give rise, and I think that *ex abundante cantela* he inserted the final words in clause 3 to make sure that she would not benefit in the possible event of his subsequently acquiring house property.

In my opinion the answer to the question contained in prayer (2) of the Summons is that Khoo Kow Kiah the deceased's second wife or her estate is precluded from sharing in the deceased's residuary estate as on intestacy. I order that the costs of these proceedings be paid out of the estate as between solicitor and client.

Order accordingly.

DAN SIN WAH v. CHAN HAI SWEE.

[Orig. Civ. Juris. (Briggs, J.) September 5, 1951]

[Kuantan — Civil Suit No. 17 of 1950]

Land Code — Power of Attorney — Whether Attorney can sign transfer of land after death of donor — Fraud.

On the 29th September 1944, by an agreement in writing, one Chan Hock Choon sold an undivided half-share of a trust property to the plaintiff. On the 29th December 1945, Chan Hock Choon died. On the 13th July 1950, the plaintiff, purporting to act as an Attorney of Chan Hock Choon, by virtue of an Irrevocable Power of Attorney, registered under the Land Code, executed a transfer of the second undivided half-share of the trust property to himself personally, and on the 24th July 1950 that transfer was registered. At the time of execution of the transfer, the plaintiff admittedly knew that Chan Hock Choon was dead.

Held, that an Irrevocable Power of Attorney does not enable a donee to get a Transfer, signed by himself as Attorney after the death of the donor of the Power, registered under the Land Code.

Cases referred to :—

(1) *Koh Ho Teik & Anor. v. Yeap Lean Seng & Ors.* (1951) M.L.J. 77; 2 M.L.R. 14.

(2) *Assets Co., Ltd., v. Mere Roihi* (1905) A.C. 176 at 120 (P.C.).

(3) *Loke Yew v. Port Swettenham Rubber Co.* (1913) A.C. 491 (P.C.).

(4) *Ong Tin v. Seremban Motor Garage* 1 F.M.S.L.R. 308.

(5) *Yap Thye Cheong v. Wong Kam* 2 F.M.S.L.R. 244.

(6) *Yong Joo Lin v. Fung Poi Fong* (1941) M.L.J. 61; (1941) F.M.S.L.R. 3.

CIVIL SUIT.

A. J. Bostock Hill for the plaintiff.

H. E. P. P. Powell for the defendant.

Briggs, J. : — Chan Chee Seng, formerly of Kuantan, died on the 25th March, 1936, having made on the 27th September, 1935, his last will, which was duly proved by the executors named. Chan Hock Choon was an adopted son of the testator, but, although the estate appears to have been substantial, the testator bequeathed to him only a legacy of $500 and no other property. There was no bequest in favour of the two sons of Chan Hock Choon then living, who were the defendant and one Chan Sio. By a trust deed dated 27th April, 1937, and executed by Chan Hock Choon, it was recited that the executors of Chan Chee Seng, being themselves beneficiaries of his estate, desired to make certain provision for the benefit of Chan Hock Choon and his two sons, and for that purpose to convey to Chan Hock Choon a piece of rubber land about 23 acres in extent then comprised in Pahang Grant No. 2598, but now comprised in Pahang Certificate of Title No. 4613, (hereinafter called "the trust property"). The transfer was effected at the same time as the trust deed was executed. The trust deed provides that the executors have caused the trust property to be transferred to the trustee in consideration of :—

(i) Their natural love and affection for the trustee's two sons;
(ii) Divers other good causes and considerations;
(iii) Settlement of the legacy of $500; and
(iv) Settlement of other claims which had been or might be brought in connection with the division of the residuary estate of the testator.

It then provides that the trustee will apply the income of the land first, to the maintenance and education of his sons, who were then aged ten and five respectively, and will retain the balance of the income of the land for his own benefit and enjoyment for life. The trusts of the capital are that the trustee holds for his two sons absolutely upon the younger of them attaining the age of twenty-one. This, of course, might have occurred long before the death of Chan Hock Choon; but in fact it did not. The deed gives no power to sell. The trust property was registered in the name of "Chan Hock Choon as trustee". No caveat was imposed to protect the trust. The plaintiff was at all material times aware of the existence of this trust, and that the trust was in favour of the infant sons of Chan Hock Choon, though he had not seen the trust deed.

In 1944 Chan Hock Choon was in financial difficulties, and in Originating Summons No. 10 of 1944 he applied in the Japanese High Court at Kuantan for leave to sell an undivided half-share of the trust property, in order to be able adequately to maintain and educate the two infant beneficiaries from its proceeds. This application appears to have been made *bona fide* and to have been such as might quite properly have been allowed in the circumstances. It was apparently heard before a Japanese "Chief Justice of Pahang" and an Indian "Judge" sitting together, and they heard the applicant and also the two infants in person. They then made an order (P3) granting leave to sell, at not less than $600 per acre. I read this as meaning that $300 or over is the approved price per acre for the half-share. The originating summons and affidavit in support (P2 and P1) and the notes of evidence (P4) seem to indicate that the proceedings were in all respects proper, except that the affidavit is open to some criticism and the two infants were not represented by a guardian-ad-litem.

On the 29th September, 1944, by an agreement in writing (P5) which recites the above Order of Court, Chan Hock Choon agreed to sell an undivided half-share of the trust property to the plaintiff, Dan Sin Wah. The purchase price, $7,000 was in accordance with the order and was fully paid at that time, but the formal transfer had to be deferred, as no land transfers were possible in Pahang at that date. There was no evidence that the $7,000 was not properly applied for the benefit of the infants. The agreement provides that the vendor will transfer as soon as possible, and that the purchaser shall have possession and full rights over the land in the interim, to be supported by an irrevocable power of attorney. The power of attorney (P6) was executed on the same day and is expressed to be irrevocable without limitation of time. I do not think the grant of this power was in breach of trust. It was not a delegation of the trustee's powers in any real sense, but merely part of the mechanism of the delayed transfer. Thereafter the plaintiff was notionally in possession of this undivided half-share of the land, but it does not appear that he ever actively exercised his right of possession. On the 29th September, 1944, Chan Hock Choon also executed the necessary transfer (P7) in favour of the plaintiff, and handed over to him the title, and this transfer was duly registered on the 5th July, 1945, by the Japanese authority. A copy of the Order of Court is attached to the transfer and it is expressed to be made in pursuance of the Order of Court.

In the meantime, Chan Hock Choon had agreed to dispose of the second undivided half-share of the trust property. By an agreement in writing dated 26th May, 1945 (P8), he agreed to sell this to the plaintiff for $10,435 and similarly received the purchase price, gave possession and granted another irrevocable power of attorney (P9) on the same date. There are

the important differences that in this case no Order of Court was made or, as far as is known, applied for, and no transfer was then executed. The plaintiff said in evidence that he knew of the Order of Court made in 1944, but did not insist on an Order of Court authorizing the second transaction "because the vendor said it was not necessary as he had got the Order for the first half". I find it difficult to follow this line of thought. The first transaction was carried out in a thoroughly business like way, and I cannot understand why the second was not. It may be that by May, 1945, the situation in Kuantan was already somewhat disturbed by knowledge or rumours of the impending re-occupation. It is possible that sittings of the Court were irregular and that considerable delay might have occurred. Leave to sell might in this case have been refused, and the parties may have realized this. But, whatever the reason, the parties chose to effect this transaction without the necessary judicial authority.

On the 29th December, 1945, Chan Hock Choon died. On the 13th July, 1950, the plaintiff, purporting to act as attorney of Chan Hock Choon by virtue of Exhibit P9, executed a transfer of the second undivided half-share of the trust property to himself personally, and on the 24th July, 1950, that transfer was registered. At the time of execution of the transfer, the plaintiff admittedly knew that Chan Hock Choon was dead.

Reverting for a moment to the question of possession, in 1946 the plaintiff had sent some labourers to do certain work on the land, but they were turned away by the servants of the beneficiaries, i.e. the defendant and his brother. The latter have been in possession (so far as any one has been in possession, for the land is in a "bad area"), ever since that time, and I have no doubt that, both in law and in fact, the plaintiff has never, at least since 1946, been in possession at all. In September, 1946, the plaintiff wrote to the District Officer, Kuantan, stating the circumstances and asking him to investigate the matter and allow his coolies to go into occupation. In October, 1946, the District Officer replied that he had no jurisdiction, and said that any claim would at that time be barred under the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, but that the matter could be taken up later in a Civil Court. In August, 1950, the plaintiff's solicitors made a formal demand for possession, which was refused. The defendant came of age recently; the other beneficiary, Chan Sio, is probably not yet of age and is not a party to these proceedings. It seems that, the life-interest of Chan Hock Choon in the income having determined, in spite of the provision for continuance of the trust until Chan Sio's majority the defendant on coming of age was entitled absolutely in possession to his half-share of whatever then formed the trust investments; and, as there is now no express trustee thereof, he is directly entitled to possession of the trust property, unless it has been lawfully transferred to the plaintiff, and is no longer impressed in his hands with the former trusts. It seems also that the defendant is in *de facto* possession.

In these circumstances the plaintiff sued for an order of delivery of possession, an account of profits made by the defendant since June, 1946, and damages for injury to the rubber trees on the land alleged to have been caused by the defendant. The claim for an account and for damages were abandoned at the trial, and the only issue is whether the plaintiff should be put into possession. He pleads and relies on his status as registered proprietor. He points out that neither the defendant nor his brother, nor anyone on his or their behalf, has ever attempted to set aside either of the transfers, either of the agreements, either of the powers of attorney, or the Order of the Japanese Court; that there is no counter claim for any such purpose, or for rectification of the register, in this action, and that the Court in consequence ought not even to consider by what means the plaintiff became the registered proprietor. I think this goes too far. Although in this country a plea of possession does not have the special and wide effect which in law it has in England, I think the defence raised here obliges me to refuse an order of possession, if I should come to the conclusion that the plaintiff, although now registered as proprietor of the land, ought not to be so registered.

It is possible that the sale of an undivided share of land held as a trust investment is in all cases improper, unless it is the whole interest of the trust in that land. But that is a minor matter which would be covered by the Japanese Order of Court, if it is otherwise effective. The only objection which counsel for the defendant could raise to the title of the plaintiff over the first half-share was that the Order of Court was irregular, in that the infants were not properly represented when it was obtained.

Immediately prior to the war it was the invariable practice to appoint a *guardian-ad-litem* for infants upon an application of this kind, but it is by no means clear that this was statutorily necessary. Section 419 of the Civil Procedure Code applies only to suits. Section 421 clearly contemplates that on an application (as opposed to a suit) a minor respondent may not be

represented by a *guardian-ad-litem*, and provides that in such case any order made may be discharged, with costs in certain circumstances to be paid by the solicitor for the applicant. Service on an infant may be made in the first instance on him personally, and in this particular case the Court was fully aware that the respondents were infants, as they were then only sixteen and twelve years old respectively and appeared in person. There was none, other than their father and natural guardian, who would have had any natural claim to represent them and, if a *guardian-ad-litem* had been appointed, he would in all probability have taken only a formal part in the proceedings. In the circumstances, the Court may have been justified in proceeding without requiring a guardian to be appointed. Indeed, this procedure was to some extent advantageous to the infants, since in consequence of it either of them could have applied on attaining majority to set the order aside. Neither of them, however, has done so. The order, in my view, was voidable, but not void. If, for example, the beneficiaries now desired to charge the estate of Chan Hock Choon that this sale was in breach of trust, they would have to set aside this order before, or in the course of, doing so.

I think that there was some impropriety in the form of the applicant's affidavit. It does not refer to the trust deed and could be read as claiming a full beneficial interest in the applicant personally, instead of the very limited interest which he had in the income; but I doubt if he intended to give that impression and I am not satisfied that the Court so understood him. I think that the Order is not shown to have been an unlawful one, and that it was one under which, so long as it was subsisting, Chan Hock Choon could transfer and the plaintiff could properly accept title, and also that the plaintiff could properly rely on it as giving him a clear title free from any equitable interests of the infants.

The effect of Japanese Orders of Court in general appears from section 19 of the Titles to Land (Occupation Period) Ordinance, 1949. This order, not having been set aside, is sufficient to validate the registration of the transfer. The case of *Kok Ho Teik & Anor. v. Yeap Lean Seng & Ors.*[1] has no application here, since the plaintiff pleads only his registration as proprietor, and not steps that led up to it. I hold that the plaintiff is now the lawful registered proprietor of the undivided half-share of the trust property first transferred, and that as such he is entitled to such degree of possession as is normally attributable to an undivided half-share in land.

As regards the second undivided half-share, the situation is different. It is true that the plaintiff is now registered as proprietor. It is possible that, under the provisions of section 161 of the Land Code, the Registrar would have been bound to register a transfer, if signed by Chan Hock Choon, regardless of the rights of the infant beneficiaries, and regardless of what might happen to the purchase money; but this transfer was not signed by Chan Hock Choon. It was signed by the plaintiff, purporting to act as his attorney. This raises a considerable difficulty on which, I am assured by counsel, there is no local authority. Section 5 of the F.M.S. Powers of Attorney Enactment (Cap. 66), now re-enacted as section 6 of the Powers of Attorney Ordinance, 1949, sets out the rights of the donee of a power of attorney expressed to be irrevocable. One of those rights is that any act done by him after the death of the donor of the power shall be as valid as if the death had not happened. It is contended that by virtue of this provision of law the plaintiff was entitled to execute a valid transfer of the second half-share, just as he would have been entitled to execute it if Chan Hock Choon had not died.

Under section 185 of the Land Code, the registering authority may require proof to his satisfaction of the continuance in force of any power of attorney. Although this power was an old one, it does not appear that the registering authority asked for proof of its continuance in force, and this would probably be a natural course to adopt, in view of the fact that it was expressed to be irrevocable, and in view of the provisions of section 6 of the Powers of Attorney Ordinance. So far as the execution of the transfer was concerned, the question whether Chan Hock Choon had died was immaterial, and there could be no revocation by his act. However, that did not conclude the matter. Section 85(ii) of the Land Code provides that "the death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit registration of such instrument, and such instrument if registered shall be void". It was contended by counsel for the plaintiff that, if a conflict arises between the provisions of the Powers of Attorney Ordinance and of this sub-section, the Powers of Attorney Ordinance must prevail for two reasons; first, because the right to execute a valid transfer would be nugatory if the transfer, though valid, could not be registered, and secondly, because the Powers of Attorney Ordinance is the later statute and so must be presumed to have been enacted with the provisions of section 85(ii) of the Land Code in the mind of the legislature. I do not think that either of these arguments

assists him. I appreciate that the re-enactment of the provision about powers of attorney puts the plaintiff in a stronger position than he would have been in, had the old Enactment remained in force; and, if there were actual conflict, I should agree that the 1949 Ordinance must prevail; but I see no such conflict. Section 6 of the Powers of Attorney Ordinance is concerned exclusively with what may lawfully be done by the donee of a power. Section 85 (ii) of the Land Code is concerned exclusively with what may lawfully be done by a registering authority and with the consequences of infringement. The Ordinance validates the transfer, but the Land Code prevents its registration. There is nothing surprising in this conclusion. There are innumerable circumstances in which an instrument intended to effect transfer of land, though perfectly valid as an instrument of transfer, is not fit for registration and will not be registered. The good conveyancer, in an agreement for sale of land, always stipulates for a transfer both "valid" and "registrable". I am of opinion that on the grounds set out in section 85 (ii) the transfer of the second undivided half-share registered in 1950 should not have been registered, and would not have been registered, if the fact of the death of Chan Hock Choon had been brought to the notice of the Registrar of Titles. Counsel for the plaintiff also contended that in the circumstances of this case the words "the death of any person" and "executed by him" in section 85 (ii) should be read as applying, not to the principal Chan Hock Choon, but to his attorney. I think this is an argument of despair. If this was not a transfer by Chan Hock Choon, it was nothing at all material to this case. It was "executed by" Chan Hock Choon because *qui facit per alium facit per se*. It is impossible to import the attorney for one purpose but not for the other.

What then is the result of the transfer having been registered, and is the position of the plaintiff in any way improved by that registration? I think not. The circumstances in which the title of a registered proprietor is defeasible appear in section 42 of the Land Code. Sub-section (iii) provides that, if the registration of any proprietor has been obtained by means of an insufficient or void instrument, such registration shall be void. The words "registration shall be void" are in direct contrast with the words "the title . . . . shall not be indefeasible" appearing in sub-section (ii) and applicable to different circumstances. I do not think it can be said that this instrument, as such, was "insufficient", and I think also that it would not be possible to say that it was "void", were it not for the last eight words of section 85 (ii). They provide that if an instrument is registered in contravention of the provisions of that sub-section (which undoubtedly covers the case of unwitting contravention) the *instrument* shall be void. This is a statutory extension of normal usage as regards the word "void". It provides, as it were, a definition of what may be a "void" instrument, applicable for the purpose of section 42 (iii), and perhaps for that purpose only. In this case one is faced with a single document, declared by one statute to be valid, and by another to be void: but the word "void" is used in so special a sense that there is no real contradiction. I am satisfied that the registration of the plaintiff as proprietor of the second undivided half-share of the trust property was obtained by means of a "void instrument" within the meaning of section 42 (iii). In consequence, his title is not merely defeasible, but the registration of the instrument is void and he is not in any true sense the registered proprietor of that half-share, although he appears as such on the face of the register.

Were this not so, and if I am wrong in so holding, I should still be satisfied that the plaintiff, although lawfully registered as proprietor of the second half-share, must hold the same as trustee for the defendant and his co-beneficiary by virtue of his express notice of the trusts affecting that half-share, which trusts had, to his knowledge, never lawfully been determined by any Order of Court or otherwise. Section 161 of the Land Code enables persons to become proprietors, free from equities, of land which was registered in the name of the former proprietor "as trustee", in the absence of express notice of the trust. It does so by absolving them from what would otherwise be their duty in equity, by reason of the constructive notice given by the words "as trustee" on the register, to enquire into the existence and nature of the potential trust. Even if the trust instrument is deposited and so can be referred to without difficulty, the situation is the same in the absence of a caveat to protect the trust: there is no duty to enquire and a failure to enquire cannot endanger the purchaser's title. It is nowhere stated, however, in section 161 or elsewhere in the Land Code that a purchaser is entitled to override beneficial rights of infant *cestuis que trustent* of which he has express notice. In this case there was wilful and deliberate participation in a breach of trust, well known to be such by both parties. It is observable that the only person who could reasonably have been expected to impose a caveat to protect the trust was Chan Hock Choon, who later broke it. I think the weight of authority of the reported cases, which are admittedly not easy to reconcile, is against the plaintiff.

Some judgments have tended to favour registered proprietors in permitting them to override trusts. Others have upheld the rights of persons beneficially entitled, to the fullest extent compatible with the express wording of the statutes. With this attitude I respectfully align myself.

Having regard to the joint effect of sections 42 and 161 of the Land Code, it may be necessary to bring the conduct of the plaintiff squarely within the meaning of the word "fraud" in section 42. In *Assets Company Limited v. Mere Roihi*[2], the Privy Council ruled that the "fraud" required for the purpose of statutes dealing with registration of title to land must be "actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud." Hogg in *Registration of Title to Land throughout the Empire*, 1920, page 128, note 41, remarks that the language of the Privy Council in *Loke Yew v. Port. Swettenham Rubber Company*[3], does not encourage a narrow interpretation of fraud; but the fraud in that case was the making of a promise to protect the unregistered interest, with a contemporaneous intention to break that promise. This, of course, amounts to a fraudulent misrepresentation as to one's own state of mind, and is clearly fraud in the strictest sense. The *Port Swettenham Case*[3] was also decided on the interpretation of illustration (h) to section 3 of the Specific Relief Enactment, 1903, but this was repealed when the Land Code was passed, and that part of the decision is perhaps no longer a governing authority. In *Ong Tin v. Seremban Motor Garage*[4], the defendants relied on alleged equitable rights arising out of a document which was held to be void because unregistered. The plaintiff was held to be entitled to override these rights, although he had express notice of them. In *Yap Thye Cheong v. Wong Kam*[5], the Court held that an unregistered mining sub-lease of which the transferee had express knowledge was binding on him, but there was no express finding of fraud, and the Court relied on illustration (h). That case, however, was weaker than the present one, in that the persons entitled to the unregistered interest might well have protected themselves and were not subject to any disability. In the *Seremban Motor Garage Case*[4], it was stated that "each case of alleged fraud must be treated with reference to its own facts and the Courts may be trusted not to permit the law to be used to encourage cheating." Hogg, at page 120 *et seq.*, deals with the question when notice may amount to fraud and states (p. 121), "Perhaps one may say . . . that any conduct amounting to dishonesty in obtaining an interest and then registering it for the purpose of shutting out a competing and unregistered interest is fraud, but that it is not fraud to insist on priority by registration where the interest thus registered was not obtained with any such purpose." At page 127, he adds, with regard to statutory provisions absolving a purchaser from the duty to enquire, "But these provisions seem only to be designed to make it clear that the absence of such an enquiry etc., is not to be treated as constructive notice and has no effect in strengthening the position of the purchaser if he does receive notice of circumstances which make it fraudulent to proceed to registration." He continues at page 128, "Perhaps the cases most difficult to deal with, as to whether the notice amounts to fraud or not, are those in which the unregistered interest is not technically adverse to the registered title but represents a beneficial interest which a former registered owner was bound to protect . . . Apparently, nothing short of an attempt to acquire the registered title by some dishonesty, and with the purpose of defeating the beneficiaries' interests, will make the registered title inconclusive when once vested in a purchaser or mortgagee." And again, " . . . no notice short of notice of an intended breach of trust would ordinarily be sufficient to derogate from the conclusiveness of the purchaser's title when once registered." At page 140, he states "Many cases occur in which mere notice has been held fraud, but in most of these the person fixed with notice was not yet registered, and in others there was an element of dishonesty in disregarding the existence of an unregistered interest." These passages do little more than confirm the judgment in the *Seremban Motor Garage Case*[4], that each case must be dealt with on its own facts. If, however, it can ever be fraudulent deliberately to overreach a trust of which one has notice, I think it was so in this case. The course of dealing between the parties makes it clear that the purchaser knew that the leave of the Court must be obtained before the land could lawfully be sold to him. He knew that the rights of infant beneficiaries incapable of protecting themselves were concerned, and he deliberately proceeded with the express purpose of extinguishing those rights. I think that this was not merely constructive or equitable fraud; I think it was dishonesty within the meaning laid down in *Assets Company Limited v. Mere Roihi*[2]. If this is so, section 161 of the Land Code does not protect the purchaser, since it extends only to protect transactions not fraudulent.

It is curious that there is so little authority on this precise point. Until the Land Code came into force, any trust of this nature obtained a reasonable degree of protection, because the instrument had to be

deposited and I think that any reasonable Registrar would have referred to it in practice before registering a transfer. In some countries the imposition of a caveat by the Registrar himself is obligatory in these circumstances — a provision which our legislature might, I think, with advantage adopt — but the tendency here has been in the other direction, and it seems that everything is done to make it difficult for infant beneficiaries to have adequate protection from the fraud or breach of trust of their trustee. If he does not impose a caveat and none else imposes one on their behalf, it is doubtful if anything can protect them short of proof that the transferee acted dishonestly, and even that would not protect them if the land had passed to a third party. It is true that the Registrar has power to impose a caveat, but he is under no duty to do so, or to enquire whether circumstances make it advisable.

The repeal of illustration (h) was undoubtedly intended to restrict the rights of persons claiming by virtue of certain types of trusts: but it is noteworthy that it dealt in terms with a beneficiary under a constructive trust, not an express one. The legislature, in enacting that illustration, evidently thought it necessary to make clear that a person taking with notice could be affected by such a constructive trust, but assumed that it was self-evident that he would be similarly affected by notice of an express trust. It is at least uncertain whether the legislature, in repealing illustration (h), intended to destroy the second and somewhat higher class of rights with the first. The Specific Relief Enactment was only intended "to define and amend the law relating to certain kinds of Specific Relief", and hardly touches the general law of trusts. The Civil Law Enactment gives that law equal statutory validity with the Land Code, and it will only yield where there is express conflict. See *Yong Joo Lin v. Fung Poi Fong*[6]. Section 161, in providing that "the proprietor shall for the purpose of transfer . . . be taken and deemed to be absolute proprietor of such land freed from the said trusts", must then be read as referring only to the ability of the proprietor to pass on the registered title, which is unrestricted. Mere constructive notice of an express trust will not then affect the purchaser; but if, as a result of actual enquiry or reference to the trust deed, whether or not it is deposited, he takes deliberately with knowledge of the beneficiaries' rights, his conscience will be affected thereby and they will be enforced against him. On this footing the second ground of decision in the *Port Swettenham Case*[3] may still govern this one, and the plaintiff may still hold as a trustee, even if not guilty of actual fraud. I prefer, however, to base myself on a finding of fraud within the meaning of section 42 (ii) of the Land Code. If therefore, contrary to my view expressed above, the plaintiff is the lawful registered proprietor of the half-share transferred in 1950, I hold that his title is defeasible and he holds the half-share as a bare trustee for the defendant and his brother. He is therefore not entitled as against the defendant to possession thereof, though he might well be entitled to such possession as against all the rest of the world, including the younger brother if he is still a minor.

In the result, I am of opinion that the claim to possession succeeds to the limited extent that the plaintiff, as the registered proprietor of, and beneficially entitled to, the half-share transferred in 1945, is entitled to possession and enjoyment of the whole of the land, but only jointly with the owner or owners of the other half-share, which the plaintiff purported to transfer to himself in 1950 by a transfer which is in law void. There will be a declaration and limited order for possession in that sense.

Who the owners of the second half-share may be, it is not necessary, and might not be easy, to decide. It is possible that in proper proceedings an order would be made to restore the name of "Chan Hock Choon as trustee" to the register, although he is now deceased. If there is a personal representative of Chan Hock Choon, the land could presumably be transmitted to him, but I am not aware that there is any such representative in existence. It would be possible for the beneficiaries to obtain the appointment of a new trustee, in view of the death of Chan Hock Choon, and it might be possible for the present defendant, being of age, to obtain a direct vesting order as regards his quarter-share. The position as regards his brother would depend on his exact age, of which I have no evidence. I think the plaintiff might have been wise to join him as a defendant in this suit, for this judgment will now not be in any way binding on him. None of these matters can be dealt with in these proceedings.

As the plaintiff has succeeded in effect in establishing his title to one half of the land, but as has failed to establish title to the other, and as he has abandoned his subsidiary claims for an account and damages, the order for taxation, if based on success on the several issues, would give both the parties and the taxing-master considerable trouble. I think that the fairest order I can make as to costs is to allow the plaintiff one-quarter of his costs of the action against the defendant. There will be judgment accordingly.

Order accordingly.